MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

CHI LIUNG HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24-1496-1989]
27 FEBRUARY 1992

LAND LAW: *Order for sale of land charged - Appeal against order of Land Administrator to be set aside - Allegation of 2 enquiries on same land - Form 16D served - Whether served on wrong party - Existence of caveats by particulars including Registrar's caveat - Effect of caveat - Whether prohibits chargee from obtaining order for sale of charged land by public auction - Reserve price fixed by Land Administrator pursuant to valuation report - Whether below market price - Objection not raised at enquiry - Notice of enquiry.*

CIVIL PROCEDURE: *Pleadings - Grounds raised outside originating summons and affidavit - Whether part precluded from raising issue not mentioned in pleading - Trite law that parties bound by pleading - Issue not raised at enquiry before Land Administrator - Party challenging contract illegal and prohibited in law - Issue of illegality - Whether party precluded from challenging illegality.*

At the request of the defendants, the plaintiffs agreed to make available to the former credit facilities in the principal sum of RM2,000,000 secured by two first legal charges over six parcels of land - three in the village of Sungai Pelek, one in the Mukim of Bukit Raja and two in the Mukim of Klang. The legal charges were executed by the defendants on 5 January 1987, and registered with the Pendaftar HakMilik, Selangor, on 25 February 1987. The two legal charges contained, *inter alia*, the following stipulations:

(a) Payment by the defendants to the plaintiffs, on demand, the said facilities together with interest thereon;

(b) Increase and variation by the plaintiffs of the interest rate from time to time without notice to the defendants;

(c) Indemnity by the borrower/chargor (the defendants in this case) for any legal expenses incurred by the bank (that is, the plaintiffs);

(d) The statement books and records of the bank to be conclusive evidence of the amount of principal, interest and other fees owing to the bank.

In spite of repeated requests by the plaintiffs to the defendants to repay the outstanding amount in full together with interest thereon, the defendants had refused and/ or neglected to do so. Consequently two notices under s. 254 of the National Land Code demanding payment, within 14 days from the date of due from and owing by the defendants. Since these notices, the defendants made some payments, but far short of the total amount due.

The plaintiffs thereupon made an application for sale by public auction, under s. 256 of the National Land Code those parcels of land covered by the two legal charges, in order to recover the sum of RM2,129,108.37, being outstanding as at 10 May 1989 together with interest thereon from 11 May 1989 till date of full settlement. There was also a claim for legal fee amounting to RM9,935 and an increase in the interest rate from 2% to 3% per annum "above the Bank's costs of funds".

The matters for consideration by the Court were:

(i) The notice of demand Form 16D defective as there was no proof of an earlier notice of demand as stated therein;

(ii) The statutory notice of demand contained no mention of amount of repayment;

(iii) Plaintiffs had no right to claim legal fee and any such fee had to go for taxation by the Senior Assistant Registrar;

Held:

[1] There was reference in the statutory Notice of Demand Form 16D to a prior letter of demand; there was, therefore, no need for the earlier letter to have been annexed as an exhibit in the plaintiff's affidavit.

[2] The amount repaid could not be reflected in the Statutory Notice of Demand Form 16D as such repayments were made after the said notice had been served on the defendants. In any case, the purported defect in the originating summons had been cured by the supplemental affidavits showing the amount of repayment made by the defendants and the exact amount due under the charge in the sum of 9,935,00.

[3] The plaintiffs have no right to claim legal fee in an action for order for sale under s. 256 of the National Land Code.

[4] Since the rate of interest was being varied upon institution of these proceedings and not from the date of the grant of the loan, the reference to such increase in the supplemental affidavits constituted sufficient notice.

[5] The reference of Chi Liung & Sons Sdn. Bhd. as chargor of the lands were not the subject matter of the instant case did not affect the validity of the service of the Notice of Demand Form 16D on Chi Liung Holdings Sdn. Bhd.

[6] As there were two separate legal charges it was in order to serve two separate statutory Notices of Demand Form 16D. The National Land Code did not specifically prohibit the services of two or more statutory notices of demand when there are more than one charge.

[Application for an order of sale allowed. Claim for legal fee revoked.]

Cases referred to:

D & C Bank Bhd. v. Che Wan Dvpt. Sdn. Bhd. & Ors. [1990] 1 MLJ 12 ***(cit)***
Campbell v. Commercial Banking Co. of Sydney [1879] 2 NSWR ***(foll)***
Malayan Banking Bhd. v. Lim Ghee Leng [1985] CLJ (Rep) 203 ***(foll)***
Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384 ***(foll)***
Central Malaysian Finance Bhd. v. Loke Kok Lai [1975] 1 MLJ 160 ***(cit)***

Legislation referred to:

National Land Code 1965, ss. 249(1)(a), 254, 256, 261(1), 268(1)

For the plaintiffs - Thilakan; M/s. Nahappan Dorairaj & Danker
For the defendants - G.T. Rajan; M/s. G.T. Rajan & Co.

JUDGMENT

Lim Beng Choon J:

This is an application for an order for sale by public auction under s. 256 of the National Land Code by Malaysian National International Merchant Bankers Bhd., the plaintiffs, in respect of the lands held under Grant for Land No. 11263 Lot No. 52 Sek. 1, Grant for Land

No. 11264 Lot No. 53 Sek. 1 and Grant for Land No. 11265 Lot No. 54 Sek. 1 all in the Village of Sungei Pelek owned by Chi Liung Holdings Sdn. Bhd., the defendants, and charged to the plaintiffs under Charge Presentation No. 2035/87 Vol. 237 Folio 131 and lands held under H.S. (D) 7036 Lot No. 7776 in the Mukim of Bukit Raja, H.S. (D) 7670 P.T. No. 21786 and H.S. (D) 8024 P.T. No. 21787 both in the Mukim of Klang again owned by the defendants and charged to the plaintiffs under Charge Presentation No. 2037/87 Vol. 2137 Folio 133 to recover the sum of RM2,129,108.37 being the outstandings due as at the 10 May 1989 together with interest thereon as from 11 May 1989 till date of full settlement. There was the usual request for an order that the Court fix a date for the said auction to be carried out, and that the Senior Assistant Registrar should fix the reserve price for the purpose of the sale.

According to the affidavit of the defendants affirmed on 10 July 1989, (encl. 2), at the request of the defendants, the plaintiffs agreed to make available to the defendants credit facilities of a principal sum of RM2,000,000. (hereinafter referred to as "The CLH Charge") and for the purpose of securing repayment of the said facilities and interest thereon, the defendants on the same day that is 5 January 1987 executed two first legal charges over the lands mentioned earlier in favour of the plaintiffs which said charge had been registered by the Pendaftar Hakmilik Selangor on the 25 February 1987 *vide* the two Charge Presentations I mentioned earlier. By the terms of the said two legal charges the defendants agreed to pay to the plaintiffs on demand the said facilities or such other sum for the time being owing on the loan account of the defendants with the plaintiffs together with interest thereon and together with all such other sums and moneys as are or may become payable by the defendants under the said two legal charges. Pursuant to Clause 4.5(2) of the said Supplemental Charge the plaintiffs could from time to time increase and vary the interest rate without notice to the defendants. In spite of the repeated requests by the plaintiffs to the defendants to repay the outstanding amount in full together with the interest due thereon the defendants had refused and/or neglected and/or failed to do so. Consequently on 29 May 1989 the plaintiffs through their solicitors served by A.R. Registered post two notices in accordance with the provisions of s. 254 of the National Land Code on the defendants demanding payment of the sum of RM2,122,359.80 being the outstanding moneys due and owing by the defendants to the plaintiffs together with interest thereon within 14 days from the date of service of the said notices. Since the sending of the two notices mentioned earlier, the defendants had made some payments and the outstanding sum due and owing by the defendants to the plaintiffs as at 10 May 1989 was RM2,129,108.37 together with accrued interest thereon. The relevant documents were annexed to the affidavit as exhibits to which I shall be referring to when necessary.

In opposing the application of the plaintiffs, the defendants, through their company secretary affirmed an affidavit on 2 March 1990 in which it was asserted that firstly "the notice of default with respect to a Charge served on the defendant under the National Land Code s. 254 is defective in law and does not reflect the actual sum owing to the plaintiff." Secondly the defendants asserted that "the plaintiff further claims the same sum in another matter under Originating Summons No. S6-24-1495-89 which would amount to duplication of actions seeking a claim far in excess of what the defendant owes the plaintiff." Lastly the defendants put the plaintiffs to strict proof of the claim and in the premises the defendants requested "the foreclosure proceedings" be dismissed with costs.

Thereafter the plaintiffs filed a number of supplemental affidavits, the contents of which are similar if not the same showing:

(a) the amount of the advance

(b) the amount of the repayment

(c) the amount of interest in arrears and the amount remaining due under the charges as at the date of the issue of the originating summons and at the date of the affidavit;

(d) legal fees; and

(e) the interest rate of 3% per annum above the Bank's costs of funds after the date of the affidavit.

At the hearing of the application of the plaintiffs on 22 October 1991, Counsel for the defendants raised a number of contentions which may be summarised as follows:

1st point - As there was no proof that an earlier notice of demand had been made, statutory notice of demand Form 16D was therefore defective.

2nd point - It was stated in the statutory notice of demand Form 16D that the total liability was RM2,122,359.80 comprising of:

Principal sum of	RM2,000,000
Interest	120,498.59
Additional Interest	1,861.21
Total	RM2,122,359.80

But in the latest supplemental affidavit of the plaintiffs affirmed on 18 October 1991 (encl. 23) the total amount claimed was:
(a) Loan advanced RM2,000,000.00
(b) Amount of repayment RM663,936.28

In the statutory notice of demand Form 16D no mention was made of the amount of repayment. There was therefore a discrepancy. Counsel cited the case of *Central Malaysian Finance Bhd. v. Loke Kok Lai* in support of this contention of his.

3rd point - Again in the latest supplemental affidavit of the plaintiffs encl. 23 it mentioned legal fee in the sum of RM9,935. Counsel contended that the plaintiffs had no right to claim legal fee as such fee must go for taxation by the Senior Assistant Registrar.

4th point - The plaintiffs had varied the interest rate from 2% to 3% above the costs of Funds without serving on the defendants any notice. This omission was contrary to Clause 4.5 of the charge annexure which stipulated that any increase in the rate must be preceded by a notice inforrming the defendants that the interest rate would be increased as from a specified date.

5th point - The statutory notice of demand Form 16D was served on Chi Liung Holdings Sdn. Bhd. as chargor but according to the charge annexure the chargor was defined as Chi Liung & Sons Sdn. Bhd. It was clear therefore that the said form 16D was served on a wrong party.

6th point - The plaintiffs were wrong in serving 2 statutory notice of demand Form 16D at the same time when under the National Land Code they should serve only one notice.

Counsel for the plaintiffs in this submission retorted that it was only after the statutory notice of demand Form 16D was sent and received by the defendant did the latter make some payments. This was clearly stated in para 9 of the plaintiffs' affidavit in respect of their application encl. 2. Moreover any defects in the enclosure had been cured by the several supplemental affidavits of the plaintiffs which clearly showed the amount of repayment made by the defendants. In any event, so said Counsel s. 254 of the National Land Code did not provide for prior notice of demand to be made before Form 16D could be served. As regards to the legal fee, Counsel contended that in the charge annexure exhibited as 'AGH3' to encl. 2 Clause 11.4 thereof stipulated that the borrower/chargor must indemnify the bank for legal expense. Furthermore Clause 13.15 thereof stipulated that the statements, books and records of the bank would be conclusive evidence of the amount of principal, interest and other fees owing to the bank. Counsel cited the case of *Development & Commercial Bank Bhd. v. Che Wan Development Sdn. Bhd. & Ors.* in support of this contention. Counsel then went on to submit that pursuant to the charge annexure exhibited as 'HGH1' encl. 2, Clause 4.5(2) thereof specified that no notice of variation of interest was required to be served on the defendants regarding any variation. With regard to the definition of Chi Liung Sdn. Bhd. as the chargor in the supplemental charge, Counsel contended that this company was the owner of lands which were not the subject matter of this action. Those other lands were charged by them under charge presentation which was being disputed in another action filed in Court 6. Finally Counsel submitted that the plaintiffs had to serve two statutory notice of demand Form 16D because in the present case there were two legal charges.

In his reply Counsel for the defendant submitted *inter alia* that the said Clause 13.15 mentioned by Counsel for the plaintiffs to show that the said clause indicated that the amount due as conclusive was wrong as there was no mention as to who in the office of the plaintiffs could say that the amount due was conclusive.

I shall now turn to the six points of contention raised by Counsel for the defendants as adumberated earlier. In respect of the 1st point it is to be noted that in the statutory notice of demand Form 16D dated 29 May 1969, the relevant statement in the second paragraph thereof reads as follows:

> Whereas you have committed a breach of the provisions of this charge by:
>
> failing or neglecting to pay inspite of a letter of demand dated 11 May 1989 and given by the chargee through their solicitors the outstanding balance due and owing under the said charge ...
>
> (Emphasis added)

It is clear from this statement that a prior letter of demand had been served on the defendants before the statutory notice of demand Form 16D was issued and served on the defendants. To my mind there is no need for the plaintiffs to annex the said letter of demand dated 11 May 1989 as an exhibit in the plaintiffs' affidavit simply because the contention of Counsel was that there was no notice of demand served on the defendants prior to the service of the statutory notice of demand Form 16D and not that the defendants had raised a dispute as regards to any defects in the earlier letter of demand. Indeed in the defendants' affidavit in reply affirmed on 2 March 1990 there was no mention at all that the defendants was not served with a prior letter of demand before the service of Form 16D. It must therefore follow

that the aforementioned statement appearing in Form 16D not being contradicted must be true (see *Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.*). There is therefore no merit in the first point.

Turning to the 2nd point, likewise there is no merit in the contention simply because it was only after the service of the statutory notice of demand Form 16D that the defendants made repayments. Under such circumstances it is obvious that the amount of repayments could not be reflected in the statutory notice of demand Form 16D which was served on the defendants prior to any repayment being made to the plaintiffs.The *Loke Hok Lai* case relied on by the Counsel is of no assistance to the defendant in respect of this contention for in that case it was decided there that the exact amount claimed must be specified in the application. It did not deal with what was specified in Form 16D which is merely a notice requiring the breach of the provisions specified in the charge to be remedied. In any event it was held by the Privy Council in *Campbell v. Commercial Banking Co. of Sydney* at 385 that:

> As to the first of these grounds, the learned Judges of the Supreme Court have held, and in their Lordships' opinion, have correctly held, not only that a notice under the act is bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that where a demand does not do away with the necessity for tendering what is actually due, unless there is at the same time refusal to receive less.

With regard to the 3rd point, there is much force in this contention raised by the Counsel for the defendants. To my mind the plaintiffs have no right to claim for what they called as legal fee in the sum of RM9,935 in an action for order for sale under s. 256 of the National Land Code. I say so for the following reasons. The purpose of charging of land is to secure the repayment of a loan together with interest arising therefrom. It must therefore follow that in an application for an order of sale of the charged land, the chargee can only claim for moneys due to him under the loan together with the interest and any expenses incurred by the chargee in respect of any quit rent or outgoings owed by the chargor to the State Authority or any local authority. This proposition is supported by s. 268(1) entitled "Application of purchase money" which reads:

> 268(1). The purchase money arising on any sale under this chapter shall be applied as follows:
>
> (a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;
>
> (b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or land Administrator, as the case may be) incurred *in connection with the making and carrying into effect, of the order for sale;*
>
> (c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;
>
> (d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of sub-section (2) of s. 242; and
>
> (e) fifthly, in the payment off of subsequent charges, if any, in the order of their priority. (Emphasis supplied)

Since s. 261(1) clearly stipulates the items to which the purchase price can be untilised, the purchase price cannot be untilised to make payment to any items **not** specified therein. It cannot be gainsaid that the so-called 'legal fee' is not an item specified in that section. Furthermore the application of the plaintiffs for an order for sale is made under O. 83 of the Rules of High Court 1980 and under para. (a) of r.1(1) of that order it is clearly stated that the order is applicable in respect of a claim for payment **moneys secured by the charge**. Likewise it is provided in subrule (3) read with subrule (6) of r. 3 of the order that the plaintiff should give the following particulars in their affidavit in support of their application:

(a) the amount of the advance;

(b) the amount of the repayment;

(c) the amount of interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining *under the charge.*

(Emphasis supplied)

Again it is obvious from O. 83 r. 3 that the plaintiffs are not entitled to claim for the so called 'legal fee' in a charge action for it were otherwise O. 83 r. 3 would have required the plaintiffs to give details of the legal fee incurred by them. Finally and more importantly, it remains a mystery as to how the plaintiffs arrived at the so-called 'legal fee' of RM9, 935 which they claimed as 'legal fee'. In any event it is provided in O. 59 r. 3(1) that:

> Subject to the following provisions of this order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.
>
> (Emphasis supplied)

For the aforementioned reasons I agree with Counsel for the defendants concerning the 3rd point of contention notwithstanding that it is stipulated in Clause 11.4 of the charge annexure that the defendants must indemnify the plaintiffs for legal expense. Such a stipulation does not give a right to the plaintiffs to claim for 'legal fee' in the charge action - they must apply separately to the Court for recovery of the legal expenses which must be taxed unless the parties agreed to the amount of the legal expense.

With regard to the 4th point, I have taken note of the fact that the increase of the interest rate to 3% per annum was mentioned by the plaintiffs only in all their supplemental affidavits in which it was stated that interest after the date of the affirmation of the said affidavits was to be 3% per annum "above the bank's costs of funds." There is no mention of any increase in the interest rate in the affidavit in support of the plaintiffs' application. Based on these facts, it is clear to me that the plaintiffs had not attempted to let alone increase the agreed rate of interest from the date the loan was granted until the institution of this action. It follows therefore even if Counsel was right in stating that the rate of interest should not be increased without notice he is in effect asking me to disallow the increase asked for from the date of judgment to the date of realisation which is a matter for me to decide whether to accede to the suggestion of Counsel. Bearing in mind that it is provided in Clause 4.5(2) that:

> Notwithstanding the above, the bank reserves the right and at its absolute discretion to vary the prescribed rate without notice to the Borrower and such varied rate(s) shall be payable from the date appearing in the bank's ledger,

it is my considered opinion that I should exercise my discretion in favour of the plaintiffs since they have been deprived of the use of the moneys due and payable to them for quite some time. Furthermore even if a notice was required, the supplemental affidavits filed by the plaintiffs in this action can be considered as sufficient notice - See: *Malayan Banking Bhd. v. Lim Ghee Leng* [1985] CLJ (Rep) 203. The 4th point of contention raised by Counsel must therefore be rejected.

As to the 5th point of contention, the short answer is that there is no merit at all in this contention simply because Chi Liung & Sons Sdn. Bhd. is described in the recital of the charge annexure as chargor of lands that are not the subject matter of this action. Counsel for the plaintiffs in his submission had stated that the lands held by Chi Liung & Sons Sdn. Bhd. was the subject matter of a different action which was being litigated in Court 6 and I accept his statements. The 5th point of contention must again be rejected.

Finally the 6th point of contention. Again the short answer to this contention is that I am in full agreement with the submission of the Counsel for the plaintiffs when he said that as there were two separate charges the plaintiffs therefore took steps to serve two separate notices of demand. The National Land Code does not specifically prohibit the service of two or more statutory notices of demand when there are more than one charge. The 6th point of contention is rejected.

The next question is in view of my findings as adumbrated about what order should I make? In considering this matter it is important for me to bear in mind that the Counsel for the defendants has successfully argued that the plaintiffs are not entitled to the costs incurred by them as legal fee. Such a claim for legal fees is foreign to a change action. The only claim recognised in a charge action must relate to the total amount due under the charge which usually comprises of the capital sum lent as security with interest arising thereon. This is clearly stated in s. 242 and form 16A of the National Land Code. In the present case there is no dispute that the amount claimed in respect of the capital sum of the loan granted to the defendants and the accrued interest arising thereon is correct (see the points raised by Counsel for the defendants as adumbrated above and the affidavit of the defendants affirmed on 2nd March 1990). The only dispute is that the statutory notice of demand Form 16D did not reflect the actual sum owing to the plaintiff. I have already dealt with this matter (see the discussion regarding the 2nd point of contention as set out above).

That being the case I think it is highly inequitable for me to dismiss the application of the plaintiffs for an order for sale of the lands which are subject to the charges for one of the maxims of equity is that equity will not suffer a wrong without a remedy. Here we have a situation where the defendants have failed to reply the loans and the accrued interests arising therefrom in accordance with the charges which pursuant to s. 249(1) (a) of the National Land Code they are statutorily obliged to repay. In failing to comply with their obligations the plaintiffs are entitled to ask this Court for an order to sell the lands which have been charged to secure for the repayment of the loans and interests pursuant to s. 256 of the National Land Code. The Court is enjoined to grant the order for sale of the lands unless it can be shown that there is "cause to the contrary." The scope of s. 256 has been explained by the Federal Court in the case of *Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors*. The principle laid down by Federal Court regarding the scope of s. 256 has been upheld by the Privy Council when that case went for appeal to the Privy Council notwithstanding that the Privy Council reversed the decision of the Federal Court based on the ground that the Federal Court had drawn out errorneous inferences from the facts of the

case. There are two other points which I have taken into consideration in determining the order I should make namely (i) the defendants have failed to settle their statutory and contractual obligations to settle the loan the interest not only within the time stipulated in the statutory notice of demand Form 16D but even up to the date of this judgment and (ii) while the capital sum of the loan and interests amount to over 1.5 million ringgit the legal fee prayed for comes to only RM9,935 a fraction of the loan and interests. Under such circumstances justice would not be done to the present case if I were to dismiss the application of the plaintiffs for an order of sale of the charged lands. To my mind the proper thing for me to do is to allow the application of the plaintiffs for an order of sale of the lands but revoking their claim for the legal fee.

There is one final matter that I should mention although this matter was not raised by Counsel for the defendants in his submission and neither was it specifically averred in the affidavit of the defendants affirmed on 2 March 1990. There is no doubt that the defendants had made some repayments toward the capital sum of the loan after the service of the relevant Form 16D and after the institution of this action. These repayments has been taken into account by the plaintiffs in assessing the capital sum of the loan and interests due and payable to them. Thus in the plaintiffs' supplemental affidavit affirmed on 15 December 1989 it was stated that:

(i)	Loan advanced -	RM2,000,000.00
(ii)	Amount of Principal Repayment	RM63,936.28
(iii)	Amount remaining due under the said charge as at 7 December 1989 amounted to	RM1,953,310.71

Similar averments were made in the plaintiffs' supplemental affidavits affirmed on 24 May 1990 and 12 November 1990 respectively. The amounts remaining due under the charge as was stated in the two affidavits however had increased since the interest kept on accumulating for the period when the capital sum remained unpaid. In the supplemental affidavit of the plaintiffs affirmed on 24 June 1991 it was averred that:

(i)	Loan advanced	RM2,000,000
(ii)	Amount of Principal Repayment	RM663,937.28
(iii)	Amount remaining due under the charge as at 30 June 1991 amounted to	RM1,669,002.74

Comparing the averments of this supplemental affidavit with the earlier supplemental affidavits of the plaintiffs it is obvious that sometime between November 1990 and June 1991 the defendants again made some repayments towards the capital sum which repayments amounted to something like RM600,000. Similar averments were contained in two further supplemental affidavits of the plaintiffs affirmed on 14 July 1991 and 1 October 1991 respectively which I need not set out. I need only to touch on the final supplemental affidavit of the plaintiffs affirmed on 18 October 1991 in which it was averred that the amount remaining due under the charge as at 22 October 1991 amounted to RM1,728,115.66 inclusive of the sum of legal fee of RM9,935. Based on these facts it may be argued that since in their application made by way of originating summons the plaintiffs are asking for more than what they are entitled to, their originating summons is therefore defective, following the ruling of Hashim Yeop A. Sani J (as he then was) in *Central Malaysian Finance Bhd. v. Loke Kok Lai* (*supra*) where the application of the plaintiff there was held to be defective on the ground that the exact

amount claimed was not specified in the application. To my mind the ruling of the learned trial Judge must be read within the context of the facts and circumstances of the case dealt with by him. There the plaintiffs' claim was for a further sum being additional interest at the rate of 12 % per annum with yearly rests to be added in their claim for the sum of RM1,419,749.88. The plaintiffs' claim in that case was clearly contrary to O. 83 r. 3(3) of the Rules of the High Court 1980 which provides *inter alia* that the chargee must give particulars of the amount of any interest at the date of the issue of the originating summons and at the date of the affidavit. In the present case the plaintiffs have given more than sufficient particulars relating to the **amount** of the interests in their several supplemental affidavits. More importantly the cause of the difference in the amount as claimed in the originating summons was caused by the defendants in making some repayments after the filing of the originating summons. It is therefore inevitable that the amount as claimed in the originating summons must proportionately be reduced as a consequence of such repayments. The plaintiffs have taken into account of these repayments and the same have been reflected in their several supplemental affidavits. It must therefore follow that any purported defect in the originating summons has been cured by the supplemental affidavits which show the exact amount due under the charge. The step taken by the plaintiffs is reasonable and proper in law for if it were otherwise it would be highly unfair to the plaintiffs for the Court to hold that their application is defective merely because the defendants chose to make some repayments at diverse dates after the institution of the plaintiffs' action. To elaborate this point supposing that a defendant chooses to make some 10 repayments after the plaintiff has instituted an action in the belief that such repayments would cause the plaintiff to stay his action notwithstanding that the repayments are highly insufficient to settle the amount due and payable to the plaintiff, must the plaintiff amend his originating summons 10 times in order to reflect the exact amount due to him? Is it not enough that he puts in supplemental affidavits to show the exact amount due to him after taking into account the amount of repayments? Surely the answer must be that it is sufficient for the plaintiff to state in his supplemental affidavits the exact amount due to him as at the date of the making of the said affidavits.

For the reasons stated above, I therefore make the following orders:

(a) the claim of the plaintiffs for an order of sale of the lands specified in the originating summons by public auction is allowed to recover the sum of RM1,718,411.81 after deduction on the legal fee in the sum of RM9,935

(b) interest (if any) imposed on the non-payment of the said legal fee is disallowed and must accordingly be deducted;

(c) order in terms of prayers (2) to (6).

Also found at [1992] 2 CLJ 849